85-1785

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS J. CARLEY,

Petitioner,

— v. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS J. CARLEY, J.D.
Petitioner
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50 pp

QUESTIONS PRESENTED

1. Does Subtitle A of the Internal Revenue Code, as amended, (26 United States Code) (26 U.S.C.) ("Code") impose any

   > TAX ("direct" in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 2, cl. 3 and/or Art. I, Sec. 9, cl. 4 of our Constitution that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers" and that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"?

   and, if there are any such impositions of Tax, which words of Subtitle A make each such imposition?

2. Does Subtitle A of the Code impose any

   > EXCISE (an "indirect" tax in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States"?

   and, if there are any such impositions of Excise, which words of Subtitle A make each such imposition?

3. Does Subtitle A of the Code make any imposition on

   > INCOME (an "Excise" - an "indirect" tax in the constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in the Sixteenth Amendment of our Constitution that "Congress shall have power to lay and collect taxes on incomes . . ." and in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States"?

and if there are any such impositions, which words of Subtitle A make each such imposition?

4. Is there any power granted by our Constitution to Congress to enact any imposition upon PERSONS and, if such power exists, which words of our Constitution grant such power to Congress?

5. Are there any laws or statutes in Subtitle A of the Code making impositions upon PERSONS or any laws or statutes imposing upon PERSONS liability-for-payment of any Subtitle A imposition and, if such laws or statutes exist, what is the wording and citation of each such law or statute?

6. Is there any power granted by our Constitution to Congress to enact 26 U.S.C. Section 6107 and, if such power exists, which words of our Constitution grant such power to Congress?

7. Is the breadth, scope and content of the district Court's 1985 Order (concerning returns of TAX imposed by Subtitle A, as distinguished from returns of EXCISE) overbroad, vague, indefinite, internally contradictory, impossible to comply with, intrinsically meaningless, unconstitutional and/or oppressive?

PARTIES TO THE PROCEEDING

The parties before this Court are solely those listed and set forth in the caption of this case.

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IN THE

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THOMAS J. CARLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thomas J. Carley petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of appeals (Appendix F, infra, 12a - 20a) is reported at 783 F.2d 341. The 1985 Order of the District Court (Appendix D, infra, 8a - 9a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Constitution of the United States (hereafter Constitution) provides in relevant part:

Article I, Section 2, clause 3:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.

Article I, Section 8, clause 1:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . .; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Article I, Section 9, clause 4:

> No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Sixteenth Amendment:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The Internal Revenue Code of 1954 (26 U.S.C.) (hereafter Code) provides in relevant part:

§6107 (b)

Any person who is an income tax return preparer with respect to a return or claim for refund shall, for the period ending 3 years after the close of the return period -

> (1) retain a completed copy of such return or claim, or retain, on a list, the name and taxpayer identification number of the taxpayer for whom such return or claim was prepared, and
>
> (2) make such copy or list available for inspection upon request by the Secretary.

§6696(e)

Definitions – For purpose of sections 6694 and 6695 –

> (1) Return.–The term "return" means any return of any tax imposed by Subtitle A.
>
> (2) Claim for refund.–The term "claim for refund" means a claim for refund of, or credit against, any tax imposed by Subtitle A.

§7701(a) (14)

The term "taxpayer" means any person subject to any internal revenue tax.

§7701(a) (36)

> (A) The term "income tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A.

Treasury Regulations (hereafter Treas. Reg.) provide in relevant part:

§301.7701-15(c) (1)

> A return of tax under subtitle A is a return filed by or on behalf of a taxpayer reporting the liability of the taxpayer for tax under subtitle A.

§301.7701-15(c) (1) (ii)

> A return of tax under subtitle A does not include . . . any . . . return of excise . . .

STATEMENT OF THE CASE

A. *Special Report To The Justices Of This Supreme Court:*

This case concerns a March 29, 1985 Order of the District Court for the Eastern District of New York (hereafter "1985 Order"). (Appendix D, infra, 8a - 9a)

As a long time member of the Bar of this and other Courts throughout our Nation, I report and certify to this Court and each Justice of this Court the following:

The Opinion issued in the name of the Second Circuit Court of Appeals in this case (12a - 20a) is a total misstatement of the facts of this case and a cover-up, breathtaking in its scope, of the District Court's 1985 Order (9a) and the questions (10a - 11a) and analysis and argumentation presented to the Second Circuit on the appeal below of the 1985 Order (9a) of the District Court.

The Second Circuit elected in its opinion to falsify and keep from national view the very sophisticated and precise 1985 Order (9a) of the District Court which gave rise to the current appeal to the Second Circuit and instant petition for a writ of certiorari.

The Second Circuit elected in its opinion (12a - 20a) to falsify throughout the entirety of its opinion legal positions and argumentation made by your petitioner. None of the positions and argumentation attributed to your petitioner by the Second Circuit in its opinion (12a - 20a) is a position or argument actually held and made by your petitioner.

While the Second Circuit's opinion is marvelously inflammatory and provocative, it is fictional and false throughout. It is a massive and masterful coverup and misstatement of the facts in this case. Neither the facts nor the text of the very sophisticated 1985 Order (9a) of the District Court which was appealed appear in the Second Circuit's opinion (12a - 20a). Neither does there appear in the Second Circuit's opinion any of the questions presented to the Second Circuit (10a - 11a) on the appeal of the 1985 Order (9a) of the District Court. The coverup is total. No one in the nation knows as yet the text of the very sophisticated

1985 Order (9a) of the District Court or the text and national and constitutional significance of the questions presented (10a - 11a) in this case.

B. *Underlying Facts and Proceedings Below:*

The following facts are in chronological order and all are based on written documents in this case.

The underlying action in this civil case was filed in the Eastern District Court of New York on July 25, 1983. The underlying Complaint is set out as Appendix A hereto (1a - 3a).

On December 28, 1983 the District Court entered an Order (4a - 5a) (hereafter "1983 Order") consisting, inter alia, of two separate pertinent parts or portions (Appendix B, infra, 4a - 5a) as follows:

First Portion of 1983 Order:

> The defendant is ordered to make available to Revenue Agent Frank Bame, or his designee, copies of all returns or claims for refund (as defined in 26 U.S.C. Section 6696(e) and Treasury Regulations Section 301.7701-15(c)) or a listing of the names and taxpayer identification number of each taxpayer for whom such returns were prepared by the defendant or any employees of the defendant or his law firm from January 1, 1980 to June 14, 1983.

Second Portion of 1983 Order (relating to relief under subsection (b) of 26 U.S.C. §7407):

> It is further ordered that in the event that Thomas J. Carley fails to provide the copies or the list referred to, within 30 days after the date of this order, the United States is entitled to an order, if it so moves, pursuant to Section 26 U.S.C. §7407(b), enjoining the defendant, his employees, his agents, and all persons in active concert or participation with him, from further acting as a return preparer.

On January 6, 1984 the 1983 Order (4a - 5a) was appealed to the Second Circuit Court of Appeals.

On January 26, 1984 the Second Circuit Court of Appeals made and filed an order (signed by Judges Winter, Pierce, and Mansfield) staying the 1983 Order pending appeal of the 1983 Order.

On March 5, 1984, the Second Circuit Court of Appeals made and filed a summary order signed by Judges Winter, Oakes and Kaufman (see Appendix C, infra, 6a -7a) vacating the Second Portion, supra, of the 1983 Order (4a - 5a) relating to relief under subsection (b) of 26 U.S.C. §7407. This summary vacating of the Second Portion of the 1983 Order was not recited or mentioned in the 1986 Opinion (Appendix F, infra, 12a - 20a) written by Judge Winter and concurred in by Judges Pierce and Davis. It was selectively and deliberately covered up in the 1986 Opinion (see 16a, fn. 2) by selectively omitting the following, quoted from the March 5, 1984 summary order (Appendix C, infra, 7a):

> 3. Appellee acknowledges that it must show appellant has engaged in specific forms of proscribed conduct before an injunction under 26 U.S.C. §7407(b) should issue, and that it has not yet had occasion to do so. The portion of the district court judgment relating to relief under that subsection, therefore, is vacated.

Thus, of the two separate pertinent portions, the only portion of the 1983 Order (4a - 5a) not vacated or abandoned immediately after the March 5, 1984 Second Circuit summary order (6a - 7a) was the First Portion, supra, of the 1983 Order (4a - 5a).

On March 29, 1985 the District Court abandoned the remaining First Portion, supra, of the 1983 Order and made an entirely different and very sophisticated order.

On March 29, 1985 the District Court in a gratuitous preamble misstated what had transpired previously in this case and completely misrepresented the terms of its 1983 Order (4a - 5a) and deliberately misstated and completely disregarded and covered up the fact that the Second Circuit had vacated (7a, ¶3.) the Second Portion, supra, of the 1983 Order (4a - 5a). The cover-up of the facts in this case is not limited to the Judges of the Second Circuit.

In lieu of the abandoned First Portion of the 1983 Order, supra, the District Court, on March 29, 1985, made a new and superceding order (the body of which 1985 Order is set forth in its entirety in Appendix D, at 9a) which is very precise, demanding, esquisitely sophisticated and

> ORDERS, that the defendant, Thomas J. Carley, shall appear before Revenue Agent Frank Bame, or his Revenue Agent Mark Brody, or any other employee designated by them, on the 30th day from the date of this Order, or if such day shall fall on a Saturday or Sunday, then on the following Monday, at the Office of the Internal Revenue Service, Field Audit Group 1109, 4th Floor, 35 Tillary Street, Brooklyn, New York 11201 at 9:00 a.m. then and there to produce for inspection, examination, and copying, all returns or claims for refund (as defined in 26 U.S.C., Section 6696(e) and Treasury Regulations Section 301.7701-15(c)), or a listing of the names and taxpayer identification number of each taxpayer for whom such returns were prepared by the defendant or any employees of the defendant or the defendant's law firm, from January 1, 1980, through June 14, 1983, said inspection, examination, and copying to continue from day to day until completed. (See Appendix D, infra, 9a)

The Second Circuit completely covered up the facts and the text of this very precise 1985 Order appealed to the Second Circuit Court of Appeals. The Second Circuit's misstatement and cover-up of the text of the 1985 Order (9a) in its opinion is found in Appendix F at the top of 17a.

The Second Circuit (12a - 20a) in a well planned and executed design to cover-up the heart and soul of the exquisitely precise and sophisticated 1985 Order (9a) and the heart, soul and body of the very precise and relevant questions presented (Appendix E, infra, 10a - 11a) to the Second Circuit on appeal of the 1985 Order (9a), deliberately omitted in its cover-up recitation (17a) the very specific, precise, sophisticated and Constitutionally significant heart of the 1985 Order (9a) and controversy herein:

> "to produce for inspection, EXAMINATION, AND COPYING, all returns or claims for refund (AS DEFINED IN 26 U.S.C., SECTION 6696(e) AND TREASURY REGULATIONS SECTION 301.7701-15(c))"
> (Emphasis supplied to highlight portions of the 1985 Order (9a) covered-up by the Second Circuit.)

The entirety of the 1985 Order is set out in Appendix D, infra (see 9a).

On April 26, 1985 the 1985 Order (9a) was appealed to the Second Circuit Court of Appeals. The Questions Presented to the Second Circuit Court of Appeals are set out verbatim in the annexed Appendix E, infra, 10a - 11a. The Questions Presented to the Second Circuit (10a - 11a) were completely covered up in the Second Circuit's opinion and not stated, addressed and answered.

On February 13, 1986 the Second Circuit entered its judgment on the appeal of the 1985 Order. It is on account of this February 13, 1986 judgment petitioner prays for a writ of certiorari based on the true facts in the record of this case.

C. *The Nature and Constitutional Significance of the Case:*

The 1985 Order of the District Court (9a) concerns very sophisticated Constitutional distinctions between returns of "TAX" and returns of "EXCISE". The 1985 Order (9a) specifically incorporated 26 U.S.C. §6696(e) and Treasury Regulations §301.7701-15(c) to define precisely the "returns" or "claims for refund" referred to by the District Court in its precise one-sentence 1985 Order (9a).

26 U.S.C. §6696(e) (1) provides "The term "return" means any return of any TAX imposed by Subtitle A" and Treasury Regulations §301.7701-15(c) (1) (ii) provides "A return of TAX under subtitle A does not include . . . any . . . return of EXCISE . . ."

Thus the 1985 Order (9a) concerns only TAXES and specifically excludes EXCISES.

The distinction between "TAXES" and "EXCISES" and the limitations on each are spelled out in our Constitution which provides in relevant part:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers." Art. I, Sec. 2, cl. 3.
>
> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . .; but all Duties, Imposts and Excises shall be uniform throughout the United States." Art. I, Sec. 8, cl. 1.
>
> "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Art, I, Sec. 9, cl. 4.

Thus the first major Constitutional inquiry in this case is whether there is "any TAX imposed by Subtitle A" subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 2, cl. 3 and/or Art. I, Sec. 9, cl. 4 of our Constitution that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers" and that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken" and, if there are any such impositions of TAX, which words of Subtitle A make each such imposition of TAX? Although thoroughly briefed below, neither respondent nor the judges of the Second Circuit could find any imposition of such TAX in Subtitle A.

The second such inquiry in this case is whether there is any EXCISE imposed by Subtitle A subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States" and, if there are any such impositions of EXCISE, which words of Subtitle A make each such imposition of EXCISE? Although thoroughly briefed below, neither respondent nor the judges of the Second Circuit could find any imposition of such EXCISE in Subtitle A.

The next such inquiry in this case is whether Subtitle A makes any imposition on INCOME (which this Supreme Court has consistently held to be an EXCISE) subject to and complying with the Constitutional requirements and limitations contained in the Sixteenth Amendment of our Constitution that "Congress shall have power to lay and collect taxes on incomes" and in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States" and, if there are any such impositions, which words of Subtitle A make each such imposition on INCOME? Although thoroughly briefed below, neither respondent nor the judges of the Second Circuit could find any such imposition on INCOME in Subtitle A.

The 1985 Order specifically incorporated Treasury Regulations §301.7701-15(c) (1) which provides "A return of tax under Subtitle A is a return filed by or on behalf of a TAXPAYER reporting the LIABILITY of the TAXPAYER for tax under Subtitle A". 26 U.S.C. §7701(a) (14) provides that "The term "TAXPAYER" means any PERSON subject to any internal revenue tax."

Thus the next major Constitutional inquiry in this case is whether there is any power granted by our Constitution to Congress to enact any imposition upon PERSONS and, if such power exists, which words of our Constitution grant such power to Congress? Although thoroughly briefed below, neither respondent nor the judges of the Second Circuit could find any words in our Constitution empowering Congress to enact any imposition upon PERSONS.

This leads logically to the next inquiry, whether Congress has enacted any imposition upon PERSONS or any laws or statutes imposing any LIABILITY upon any PERSON for any tax under Subtitle A and, if any such laws or statutes exist, what is the wording and citation of each such law or statute making such imposition on PERSONS or imposing such LIABILITY upon any such PERSON. Although thoroughly briefed below, neither respondent nor the judges of the Second Circuit could find any law or statute making impositions on PERSONS or imposing LIABILITY upon any PERSON for TAX under Subtitle A.

Almost rhetorically, the next inquiry is whether there is any power granted by our Constitution to Congress to enact 26 U.S.C. §6107 (as specifically defined and limited in 26 U.S.C. §7701(a)(36) (A) to concern and apply only to TAXES imposed by Subtitle A) and, if such power exists, which words of our Constitution grant such power to Congress? Although thoroughly briefed below, neither respondent nor the judges of the Second Circuit could find any words in our Constitution empowering Congress to enact 26 U.S.C. §6107.

Our final inquiry is whether the breadth, scope and content of the 1985 Order (9a) is overbroad, vague, indefinite, internally contradictory, impossible to comply with, intrinsically meaningless, unconstitutional and/or oppressive. Although thoroughly briefed below, neither respondent nor the judges of the Second Circuit could make any sense out of, or understand, the 1985 Order (9a); neither could they find any Constitutional foundation whatever for any of the provisions of Subtitle A which is the foundation upon which is built the 1985 Order (9a).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTIONS CONCERNING THE CONSTITUTIONAL LIMITATIONS ON THE POWER OF CONGRESS TO IMPOSE TAXES, EXCISES, IMPOSTS AND DUTIES, AND WHETHER CONGRESS HAS, WITHIN THE LIMITATIONS OF OUR CONSTITUTION, IMPOSED ANY TAXES, EXCISES, IMPOSTS OR DUTIES IN SUBTITLE A OF THE CODE.

While this Court has written lucidly and authoritatively on this subject in the past, there are certain forces in this nation on the payroll of the United States undermining and refusing to follow the rulings of this Court and the provisions and limitations of the Constitution of the United States. The people who are thus undermining our Supreme Court and Constitution are being financed by the treasure of the United States; this really ought not continue.

This case presents this Court with a marvelous and unique opportunity to replace ignorance with scholarship – to explain the limitations of our Constitution upon Congress – to explain the differences between the two great Constitutional classes of direct and indirect taxes and the Constitutional limitations applicable to each of such two great classes.

In this present case we are dealing specifically with the question whether Subtitle A of the Code imposes any TAXES (direct impositions in the Constitutional sense) as distinguished from EXCISES (indirect impositions in the Constitutional sense).

In the extensive briefing in the Court below, it was clearly shown and undisputed by respondent that there is no imposition of TAX in Subtitle A at all. It was also clearly shown and undisputed by respondent in the Court below there is no imposition of any form of EXCISE in Subtitle A which is "uniform throughout the United States" as required by Art. I, Sec. 8, cl. 1 of our Constitution. In sum, it was clearly shown and undisputed by respondent in the Court below that the entirety of Subtitle A has no Constitutional foundation whatever.

The Court below by covering up the facts, constitutional questions, analysis and argumentation presented has effectively withheld from your petitioner his constitutionally guaranteed rights to redress of grievances. The Court below has thus effectively in this case overruled and withheld from your petitioner the rights, privileges and immunities which our Constitution was put in place to protect. The Court below has thus also effectively in this case overruled the scholarly opinions of this Court concerning limitations placed on Congress by our Constitution; these scholarly and relevant opinions of this Supreme Court include *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Knowlton v. Moore*, 178 U.S. 41 (1900); *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1 (1916); *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916); and *Taft v. Bowers*, 278 U.S. 470 (1929).

That is a lot of Supreme Court scholarship to be overruled and discarded in one case by an inferior court, and especially so when the Court below has offered no scholarship of its own to fill the void caused by its discarding this Court's scholarship and our Constitution and its protections.

The extraordinary precision of the underlying 1985 Order (9a) gives rise to each of the extraordinarily important Constitutional questions raised in this case concerning Subtitle A of the Code. The answers to these Constitutional questions will affect the daily lives of every person in this nation. Because these questions have been so thoroughly researched by both parties to this action, the answers to the questions are clean-cut, definitive and spelled out in the following points A through G.

A. ***It Is Undisputed By Respondent That There Are No TAXES Imposed By Subtitle A Of The Code.***

The 1985 Order (9a) (incorporating, as it does, 26 U.S.C. §6696(e) and Treas. Reg. §301.7701-15(c)), concerns only returns of "TAX imposed by Subtitle A", which Subtitle A of the Code consists of all those sections of the Code numbered below §2000.

It is undisputed by respondent that there is no TAX imposed by Subtitle A in the entirety of Subtitle A.

It is undisputed by respondent that there is no TAX imposed by Subtitle A which Constitutionally must be apportioned among the several States of this Union in compliance with Art. I, Sec. 2, cl. 3 and Art. I, Sec. 9, cl. 4 of our Constitution which provide in relevant part respectively:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.
>
> No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

It is undisputed by respondent that there is no TAX imposed by Subtitle A on any State included within this Union – not even one State of this Union – and not even a word or phrase about apportionment among the several States of this Union.

Neither respondent nor the judges of the Second Circuit (12a - 20a) could find any "TAX imposed by Subtitle A". There is no such "TAX imposed by Subtitle A".

B. ***It Is Undisputed By Respondent That There Are No EXCISES (Nor Imposts Nor Duties) Imposed By Subtitle A Of The Code.***

The 1985 Order (9a) (incorporating, as it does, 26 U.S.C. §6696(e) and Treas. Reg. §301.7701-15(c) (1) (ii)), specifically provides that a return of tax under Subtitle A does not include any return of EXCISE.

It is undisputed by respondent that there is no EXCISE imposed by Subtitle A in the entirety of Subtitle A.

It is undisputed by respondent that there is no EXCISE imposed by Subtitle A which is, and Constitutionally must be, uniform throughout the United States in compliance with Art. I, Sec. 8, cl. 1 of our Constitution, which provides in relevant part that "all Duties, Imposts and Excises shall be uniform throughout the United States." Neither respondent nor the judges of the Second Circuit (12a - 20a) could find any such EXCISE imposed by Subtitle A; there is no such EXCISE imposed by Subtitle A.

C. ***It Is Undisputed By Respondent That There Are No Impositions In Subtitle A Of The Code On INCOMES.***

This Supreme Court has authoritatively and lucidly ruled and teaches that impositions on INCOMES are in their nature EXCISES and that EXCISES shall be uniform throughout the United States. *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1 (1916); *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916).

It is undisputed by respondent that such EXCISES must be *geographically* uniform throughout the United States so as to comply with the limitations of our Constitution Art. I, Sec. 8, cl. 1 which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States". *Knowlton v. Moore*, 178 U.S. 41 (1900).

This Supreme Court teaches us in *Brushaber*, supra, at page 13:

> In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.

Thus this Court teaches that each of the two great classes of direct and indirect taxes is governed by its own Constitutional regulation and not by the other. Direct TAXES are governed by the rule of apportionment and not by the rule of uniformity. Duties, imposts and EXCISES (including those on INCOMES) are governed by the rule of uniformity and not by the rule of apportionment.

That Congress has power to lay EXCISES (indirect taxes in the Constitutional sense) on INCOMES in accord with the Constitutional regulation of geographic uniformity throughout the United States is undisputed by respondent.

That impositions on INCOMES are EXCISES and not subject to the regulation of apportionment among the several States is undisputed by respondent and emphatically enunciated in the Sixteenth Amendment of our Constitution:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Notwithstanding the clear 16th Amendment power of Congress to impose excises on INCOMES, it is undisputed by respondent that of all the impositions in Subtitle A of the Code, none is upon INCOMES and all are upon concepts OTHER THAN INCOMES.

In the entirety of Subtitle A, there are no impositions whatever on the simple and pure concept "INCOMES". This is undisputed by respondent. Neither respondent nor the judges of the Second Circuit (12a - 20a) could find any excise imposition on the pure and simple concept "INCOMES"; there is no such imposition on the pure and simple concept "INCOMES" in Subtitle A.

D. *It Is Undisputed By Respondent That Congress Has Not Exercised Any Of Its Constitutional Powers In Subtitle A Of The Code.*

While Congress has Constitutional power to lay and collect Taxes, Duties, Imposts and Excises (including those on incomes), Congress has not exercised any of such Constitutional powers in Subtitle A of the Code.

It is indisputable that there are no Imposts or Duties imposed in Subtitle A; no one can find any such in Subtitle A.

It is also undisputed (see point A, supra) by respondent that there are no TAXES imposed by Subtitle A.

It is also undisputed (see point B, supra) by respondent that there are no EXCISES imposed by Subtitle A.

It is also undisputed (see point C, supra) by respondent that there are no excise impositions on INCOMES in Subtitle A.

In the matter of taxation, there are no other possibilities or classifications. Of all the powers granted to Congress by our Constitution, Congress has not exercised in Subtitle A any of the Constitutional powers granted it. There is no Constitutional foundation whatever for Subtitle A or its provisions. This is also undisputed by respondent.

E. ***It Is Undisputed By Respondent That Congress Has No Constitutional Power To Tax PERSONS And That Congress Has Not Enacted Any Law Making Any Imposition On PERSONS In Subtitle A Of The Code.***

While Congress has Constitutional power to lay and collect Taxes, Duties, Imposts and Excises (including those on incomes), Congress has no Constitutional power to tax PERSONS and has not enacted any law or statute making any imposition on *PERSONS* in Subtitle A of the Code.

The text of the 1985 Order (9a) is very precise and specifically refers to "names . . . of each *TAXPAYER*" and the very precise 1985 Order (9a) also incorporates Treasury Regulations §301.7701-(15)(c) (1) which provides that "A return of tax under Subtitle A is a return filed by or on behalf of a *TAXPAYER* reporting the liability of the TAXPAYER for tax under subtitle A."

Code §7701(a) (14) provides that "The term "*TAXPAYER*" means any PERSON subject to any internal revenue tax."

In order therefore to determine whether there is any "TAXPAYER" we are directed to Code §7701(a) (14) and there learn that a "*TAXPAYER*" is any *PERSON* subject to any internal revenue tax.

The 1985 Order thus requires as a foundation that there be such a PERSON before the term "taxpayer" as used in the text of the 1985 Order (9a) and its incorporated language can have any defined meaning or be understood.

The initial inquiry concerning *PERSONS* is thus whether there is any Constitutional power granted to Congress to tax *PERSONS.*

It is undisputed by respondent that there is no Constitutional power granted to Congress to tax PERSONS.

While Congress has those powers granted it in the Constitution to lay and collect Taxes, Duties, Imposts and Excises (including those on "incomes"), Congress has no power granted to it by our Constitution to tax *PERSONS.* This is undisputed by respondent.

In a 1927 case where the litigants did not argue the points argued in this present case, Second Circuit Judge Learned Hand teaches:

> If it is important, I suggest that the language of the (Sixteenth) Amendment itself gives Congress power to lay "taxes on incomes", NOT ON PERSONS. (Emphasis added). *Bowers v. Taft*, 20 F.2d 561 at 564 (1927).

And in that same case, this Supreme Court also teaches:

> Income is the thing which may be taxed - income from any source. The Amendment does not attempt to define income or to designate how taxes may be laid thereon, or how they may be enforced. *Taft v. Bowers*, 278 U.S. 470 at 481 (1929).

It is undisputed by respondent that there is no Constitutional power granted to Congress to tax *PERSONS*.

It is also undisputed by respondent that Congress did not enact any law or statute subjecting any *PERSONS* to any tax imposed by subtitle A.

This Supreme Court also teaches in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, at 582 (1895):

> Nothing can be clearer than what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing *PERSONS* and property within any State through a majority made up from the other States.

It is undisputed by respondent that Congress has no power granted it by our Constitution to tax *PERSONS* or subject any *PERSON* to any tax imposed by subtitle A.

It is undisputed by respondent that there is no *PERSON* subject to any internal revenue tax and that therefore the term "*TAXPAYER*" as defined in Code §7701(a)(14) and used in the text and incorporated references of the 1985 Order is meaningless, as is also the 1985 Order (9a) itself.

F. *It Is Undisputed By Respondent That Congress Has No Constitutional Power To Enact 26 U.S.C. §6107.*

Code §6107 refers to the term "income tax return preparer", which term is defined in Code §7701(a)(36)(A) to mean a person who prepares for compensation any return of "TAX imposed by Subtitle A"; this is undisputed by respondent.

It is also undisputed by respondent that there is no "TAX imposed by Subtitle A" and that Code §6107 cannot be applied or complied with because it has no real meaning and cannot be understood by anyone.

While Congress has Constitutional power to lay and collect Taxes, Duties, Imposts and Excises (including those on incomes), it is undisputed by respondent that there is no Constitutional power granted to Congress to enact Code §6107.

G. *It Is Undisputed By Respondent That The District Court's 1985 Order Is Over-broad, Vague, Indefinite, Internally Contradictory, Impossible To Comply With, Intrinsically Meaningless, Unconstitutional And Oppressive.*

The 1985 Order (9a) concerns "TAXES imposed by Subtitle A". Not only is it conceded by respondent that there are no TAXES imposed by subtitle A, it is also conceded by respondent that there are no imposts, duties or EXCISES (including those on INCOMES) imposed by subtitle A; please see points A through E, supra.

Neither respondent nor the judges of the Second Circuit could make any sense of, or understand, the 1985 Order (9a); neither could they find any Constitutional foundation for any of the provisions of Subtitle A, which Subtitle A is merely an illusion upon which is built the 1985 Order (9a).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas J. Carley, J.D.
Petitioner
159 Princeton Road
Rockville Centre, New York 11570
(516) 766-2489

APPENDIX

APPENDIX A

1983 COMPLAINT

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS J. CARLEY,

Defendant.

JUDGE WEXLER

Civil Action No. 83-3220

COMPLAINT

The United States of America ("the United States") by its attorney, Raymond J. Dearie, United States Attorney for the Eastern District of New York, alleges as follows:

1. This is a civil action brought by the United States for a judicial decree compelling the defendant, Thomas J. Carley ("Carley"), to make available to the United States, in accordance with Section 6107(b) of the Internal Revenue Code of 1954 ("the Code"), Title 26 of the United States Code: (a) copies of all federal tax returns prepared by him or any of his employees during the period from January 1, 1980 through June 14, 1983, or (b) a list of the names and taxpayer identification numbers of each taxpayer for whom such returns were prepared.

2. This civil action is authorized and requested by the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury of the United States, and is brought at the direction of the Attorney General of the United States pursuant to Code Section 7401.

3. This Court has subject matter jurisdiction over this action pursuant to Code Section 7402(a) and Sections 1340 and 1345 of Title 28 of the United States Code.

4. Carley resides within the jurisdiction of this Court at 159 Princeton Road, Rockville Center, New York 11570.

5. Carley was an income tax return preparer during the period from January 1, 1980 through June 14, 1983.

6. On January 11, 1983, a delegate of the Secretary of the Treasury, in accordance with Code Section 6107(b), requested Carley to make available for inspection: (a) copies of all returns prepared by Carley, or any person employed by him, during the calendar years 1980 and 1981 or (b) a list of the names and taxpayer identification numbers of the taxpayers for whom such returns were prepared.

7. On June 14, 1983, a delegate of the Secretary of the Treasury, in accordance with Code Section 6107(b), requested Carley to make available for inspection: (a) copies of all returns prepared by Carley, or any person employed by him, during the period January 1, 1982 through June 14, 1983, or (b) a list of the names and taxpayer identification numbers of the taxpayers for whom such returns were prepared.

8. Carley has refused to make available for inspection either the copies of the returns or the lists referred to in paragraphs 6 and 7.

WHEREFORE, the United States respectfully prays for:

A. A judicial decree compelling the defendant, Thomas J. Carley, to make available to the United States, in accordance with Section 6107(b) of the Internal Revenue Code of 1954, copies of all federal tax returns prepared by him or any of his employees during the period from January 1, 1980 to June 14, 1983, or a list of the names and taxpayer identification numbers of each taxpayer for whom such returns were prepared.

B. In the event the defendant, Thomas J. Carley, fails to comply with the decree requested in part A of this prayer for relief within 30 days of the date of such decree, a judgment, pursuant to Section 7407(b) of the Internal Revenue Code of 1954, enjoining the defendant from further acting as an income tax return preparer.

C. Such other relief as the Court may deem just, including the costs of this action.

Dated: Brooklyn, New York
July 25, 1983

RAYMOND J. DEARIE
United States Attorney

By: _____
KIYO A. MATSUMOTO
Assistant United States Attorney

_____
ALLEN R. MASS
Trial Attorney
Tax Division
United States Department of Justice
Washington, D.C. 20530
(202) 724-6563

APPENDIX B

1983 ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS J. CARLEY,

Defendant.

JUDGE WEXLER

Civil Action No. 83-3220

ORDER

This matter comes on before the court on the motion of United States for an order: (a) granting summary judgment in favor of the United States for the relief demanded in the complaint; and (b) dismissing the defendant's counterclaim against the United States.

It appearing that there is no genuine issue as to any material fact and that the United States is entitled to judgment as a matter of law, it is ordered that the motion of the United States for summary judgment is granted. The defendant is ordered to make available to Revenue Agent Frank Bame, or his designee, copies of all returns or claims for refund (as defined in 26 U.S.C. Section 6696(e) and Treasury Regulations Section 301.7701-15(c)) or a listing of the names and taxpayer identification number of each

taxpayer for whom such returns were prepared by the defendant or any employees of the defendant or his law firm from January 1, 1980 to June 14, 1983.

It is further ordered that in the event that Thomas J. Carley fails to provide the copies or the list referred to, within 30 days after the date of this order, the United States is entitled to an order, if it so moves, pursuant to Section 26 U.S.C. 7407(b), enjoining the defendant, his employees, his agents, and all persons in active concert or participation with him, from further acting as a return preparer.

It is further ordered that the defendant's counterclaim is dismissed with prejudice.

Dated: Uniondale, New York
December 28, 1983

LEONARD D. WEXLER
United States District Judge

APPENDIX C

MARCH 5, 1984 SUMMARY ORDER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of March, one thousand nine hundred and eighty-four.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JAMES L. OAKES,

HONORABLE RALPH K. WINTER,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

THOMAS J. CARLEY,

Defendant-Appellant.

84-6020

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, and vacated in part.

1. Appellee has made a sufficient showing that appellant was an income tax return preparer for purposes of 26 U.S.C. § 6107, and that he failed to make the documents described in that section available for inspection. Appellant's frivolous denials fail to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Accordingly, the entry of summary judgment compelling appellant to make those documents available was entirely proper.

2. The district court was also correct in dismissing appellant's counterclaim. It is barred by sovereign immunity, *Dugan v. Rank*, 372 U.S. 609 (1963), and in any case does not present any facts to support the conclusory allegations of civil rights violations. *Cf. Heller v. Roberts*, 386 F.2d 832 (2d Cir. 1967) (per curiam).

3. Appellee acknowledges that it must show appellant has engaged in specific forms of proscribed conduct before an injunction under 26 U.S.C. § 7407(b) should issue, and that it has not yet had occasion to do so. The portion of the district court judgment relating to relief under that subsection, therefore, is vacated.

4. Appellant's other contentions are entirely without merit.

5. Accordingly, the judgment of the district court is affirmed insofar as it requires appellant to make available documents pursuant to 26 U.S.C. § 6107.

IRVING R. KAUFMAN,

JAMES L. OAKES,

RALPH K. WINTER,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX D

1985 ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS J. CARLEY,

Defendant.

JUDGE WEXLER

Civil Action No. 83-3220

ORDER

This Court, having issued an Order on December 28, 1983, directing the defendant Thomas J. Carley, "to make available to Revenue Agent Frank Bame, or his designee, copies of all returns or claims for refund (as defined in 26 U.S.C., Section 6696(e) and Treasury Regulations Sections 301.7701-15(c)) or a listing of the names and taxpayer identification number of each taxpayer for whom such returns were prepared by the defendant or any employees of the defendant or his law firm from January 1, 1980 to June 14, 1983," having directed said defendant to comply within 30 days of the date of that order, judgment having been entered on December 30, 1983, and this portion of such order having been affirmed by the United States Court of Appeals for the Second Circuit on March 5, 1984, hereby

ORDERS, that the defendant, Thomas J. Carley, shall appear before Revenue Agent Frank Bame, or his Revenue Agent Mark Brody, or any other employee designated by them, on the 30th day from the date of this Order, or if such day shall fall on a Saturday or Sunday, then on the following Monday, at the Office of the Internal Revenue Service, Field Audit Group 1109, 4th Floor, 35 Tillary Street, Brooklyn, New York 11201 at 9:00 a.m. then and there to produce for inspection, examination, and copying, all returns or claims for refund (as defined in 26 U.S.C., Section 6696(e) and Treasury Regulations Section 301. 7701-15(c)), or a listing of the names and taxpayer identification number of each taxpayer for whom such returns were prepared by the defendant or any employees of the defendant or the defendant's law firm, from January 1, 1980, through June 14, 1983, said inspection, examination, and copying to continue from day to day until completed.

LEONARD D. WEXLER
United States District Judge
Uniondale, New York

Dated: Uniondale, New York
March 29, 1985

APPENDIX E

QUESTIONS PRESENTED TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON APPEAL OF THE 1985 ORDER OF THE DISTRICT COURT

1. Does Subtitle A of the Internal Revenue Code, as amended, (26 United States Code) (26 U.S.C.) ("Code") impose any

   > TAX ("direct" in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 2, cl. 3 and/or Art. I, Sec. 9, cl. 4 of our Constitution that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers" and that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"?

   and, if there are any such impositions of Tax, which words of Subtitle A make each such imposition?

2. Does Subtitle A of the Code impose any

   > EXCISE (an "indirect" tax in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States"?

   and, if there are any such impositions of Excise, which words of Subtitle A make each such imposition?

3. Does Subtitle A of the Code make any imposition on

   > INCOME (an "Excise" - an "indirect" tax in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in the Sixteenth Amendment of our Constitution that "Congress shall have power to lay and collect taxes on incomes ..."

and in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States"?

and if there are any such impositions, which words of Subtitle A make each such imposition?

4. Is there any power granted by our Constitution to Congress to enact 26 U.S.C. Section 6107 and, if such power exists, which words of our Constitution grant such power to Congress?

5. Is the breadth, scope and content of the Order of the District Court below overbroad, vague, indefinite, internally contradictory, impossible to comply with, intrinsically meaningless, unconstitutional and/or oppressive?

6. Is there any power granted by our Constitution to Congress to enact any imposition upon persons and, if such power exists, which words of our Constitution grant such power to Congress?

7. Are there any laws or statutes imposing liability-for-payment of any Subtitle A imposition and, if such laws or statutes exist, what is the wording and citation of each such law or statute?

8. Is Subtitle A of the Code unconstitutional because it violates Article I, Section 8, clause 1 of our Constitution?

9. Is Subtitle A of the Code unconstitutional because it violates Article I, Section 2, clause 3 and/or Article I, Section 9, clause 4 of our Constitution?

10. Is Subtitle A of the Code unconstitutional because it violates the Sixteenth Amendment of our Constitution?

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 73—August Term, 1985

(Argued: October 25, 1985

Decided: February 13, 1986)

Docket No. 85-6099

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

THOMAS J. CARLEY,

Defendant-Appellant.

Before:

PIERCE, WINTER and DAVIS*,

Circuit Judges.

* Honorable Oscar H. Davis, United States Circuit Judge for the Federal Circuit, sitting by designation.

Appeal from an order in the United States District Court for the Eastern District of New York, Leonard D. Wexler, *Judge*, requiring the presentation to the Internal Revenue Service of copies of income tax returns prepared by appellant or his employees, or a listing of taxpayers for whom appellant prepared returns.

Order affirmed. We impose double costs on appellant under Rule 38, Fed. R. App. P., for bringing this frivolous appeal and remand for a determination under Rule 11, Fed. R. Civ. P., of all costs incurred by the government, including attorney's fees, since March 5, 1984, as a result of Carley's refusal to provide the documents that are the subject of this action.

ELAINE F. FERRIS, Attorney, Tax Division, Department of Justice, Washington, D.C. Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup and Richard W. Perkins, Attorneys, Tax Division, Department of Justice, Washington, D.C., Raymond J. Dearie, United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for Plaintiff-Appellee*.

THOMAS J. CARLEY, Rockville Centre, New York, *pro se for Defendant-Appellant*.

WINTER, *Circuit Judge*:

On this appeal Thomas J. Carley asserts various claims that he has twice raised without success in this court in the recent past. These claims notably include the assertion that the Sixteenth Amendment to the United States Constitution does not empower Congress to impose the income taxes of the Internal Revenue Code, 26 U.S.C. §§ 1-1564 (1982). On the previous occasions, we rejected Carley's claims as frivolous but refrained from imposing sanctions. On this occasion, we once more reject his claims, impose double costs under Rule 38, Fed. R. App. P., and remand under Rule 11, Fed. R. Civ. P., for a determination of costs and attorney's fees incurred by the government since March 5, 1984 as a result of Carley's refusal to provide the documents that are the subject of this action.

Carley is a lawyer and income tax preparer with a documented history of using preparation methods that are not in compliance with the tax laws. He has repeatedly signed returns as a preparer in which salaried taxpayers have reported their wages on Schedule C, Profit or (Loss) from Business or Profession, and have deducted their personal living expenses as business expenses. In addition, Carley has represented taxpayers in litigation, some of whose returns he has prepared, on whose behalf he has repeatedly raised frivolous arguments, including that the income tax is unconstitutional and that wages are not income. *See Ficalora v. Commissioner*, 751 F.2d 85 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1869 (1985); *Manley v. Commissioner*, 46 T.C.M. (CCH) 1359 (1983); *Charczuk v. Commissioner*, 46 T.C.M. (CCH) 847 (1983); *Lively v. Commissioner*, 705 F.2d 1017 (8th Cir. 1983).

To determine the extent of noncompliance caused by Carley, the Internal Revenue Service ("IRS") sought copies of income tax returns prepared by Carley or any of his employees, or a listing pursuant to I.R.C. § 6107(b) of taxpayers for whom Carley had prepared returns.[1] On January 26, 1983, following proper notice, an IRS agent appeared at Carley's office in order to inspect the documents for the years 1980 and 1981. Carley refused the agent entry. The request was broadened to include the period January 1, 1982 to June 14, 1983, but Carley refused the IRS's request to appear at its office with the documents. On July 25, 1983, the Government filed this suit in the Eastern District to compel Carley to produce the requested documents.

Carley responded with numerous defenses that challenged the constitutionality of the tax laws and the enforcement actions of the IRS. He also filed a counterclaim for $10,000, asserting violations of his civil rights. On October 19, 1983, Carley served a list of 68 interrogatories upon the Government. In those, he requested that the Government provide him with the citations to the United States Constitution that empowered Congress to enact various provisions of the Code. He also asked for the "precise legal definition" of certain terms, such as "income tax return preparer," "taxpayer," "re-

---

1 Section 6107(b) provides:

> Any person who is an income tax return preparer with respect to a return or claim for refund shall, for the period ending 3 years after the close of the return period—
>
> (1) retain a completed copy of such return or claim, or retain, on a list, the name and taxpayer identification number of the taxpayer for whom such return or claim was prepared, and
>
> (2) make such copy or list available for inspection upon request by the Secretary.

turn," "income tax," "taxable income," and "adjusted gross income." The district court ruled that the United States need not reply to the interrogatories until the Government's motion for summary judgment had been heard.

The district court granted the Government's motion for summary judgment on December 28, 1983, and dismissed Carley's counterclaim. The court's order directed Carley "to make available to Revenue Agent Frank Bame, or his designee, copies of all returns or claims for refund (as defined in 26 U.S.C., Section 6696(e) and Treasury Regulations Sections 301.7701-15(c)) or a listing of the names and taxpayer identification number of each taxpayer for whom such returns were prepared by the defendant or any employees of the defendant or his law firm from January 1, 1980 to June 14, 1983." On March 5, 1984, this court affirmed by unpublished order, ruling that Carley's arguments lacked any merit.[2]

After this ruling, Carley represented the appellant in *Ficalora* and raised the same legal arguments. We rejected these in a published opinion.

On March 21, 1985, the Government filed a motion in the instant case for an order to compel compliance with

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2 The Summary Order of March 5, 1984 stated:

> 1. Appellee has made a sufficient showing that appellant was an income tax return preparer for purposes of 26 U.S.C. § 6107, and that he failed to make the documents described in that section available for inspection. Appellant's frivolous denials fail to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Accordingly, the entry of summary judgment compelling appellant to make those documents available was entirely proper.

Concerning the other issues raised on this appeal, the summary order stated:

> 4. Appellant's other contentions are entirely without merit.

the district court's December 28, 1983 order as affirmed by this court. On March 29, 1985, the district court ordered Carley to appear on a specified day at an IRS office in Brooklyn to produce for inspection all returns or claims for refund, or a listing of the name and taxpayer identification number of each taxpayer for whom such returns were prepared, as had previously been ordered on December 28, 1983. Carley now appeals from this most recent order.

Carley's arguments on this wholly repetitive appeal are plainly frivolous. Again, he argues that the income tax is unconstitutional because the Sixteenth Amendment limited the taxing power of Congress, and conferred no new power of taxation, the identical argument he made unsuccessfully in the earlier appeal in the instant case and later as counsel in *Ficalora*.

Vexatious repetition is evident in Carley's other arguments. He argues that the income tax is unconstitutional under any of several provisions, including Article I, Section 9, Clause 4. This argument was also advanced by Carley in the first appeal in the present case and in *Ficalora*. We concluded in the latter that "there is no question but that Congress has the constitutional authority to impose an income tax." 751 F.2d at 87. Carley argues next that there is no "tax" imposed by Subtitle A of the Internal Revenue Code, the subtitle entitled "Income Tax." Since there is no "tax," he contends that there cannot be a "return" or a "claim for refund," and the Order pursuant to I.R.C. § 6107(b) compelling disclosure of returns and claims for refunds is thus "gibberish." An essentially identical contention was made in the earlier appeal and in *Ficalora*, where we rejected Carley's argu-

ment that there is no statute that makes an individual liable to pay income tax. 751 F.2d at 87-88.

Carley's arguments were thus rejected in the first appeal in this case and in *Ficalora*. Other courts have rejected the same or similar arguments when Carley has raised them in other cases. In *Lively*, 705 F.2d at 1018, Carley was counsel to two taxpayers who made many of the arguments raised on this appeal. The Eighth Circuit found the arguments "wholly without merit," and concluded that the appeal was frivolous. That court then invoked Rule 38 of the Federal Rules of Appellate Procedure, and assessed double costs against the taxpayers. That rule provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Carley has thus forced the Government and the courts to expend considerable time and resources in the repetitive litigation of these utterly frivolous issues. Sanctions are therefore in order, and in light of *Lively* double costs must be assessed for this appeal under Rule 38.

We note that the provision in Rule 38 for "just damages" also allows the award of attorney's fees for a frivolous appeal. *See, e.g., United States v. Potamkin Cadillac Corp.*, 689 F.2d 379 (2d Cir. 1982) (per curiam) (double costs and attorney's fees assessed jointly and severally against client and attorney); *Gattuso v. Pecorella*, 733 F.2d 709 (9th Cir. 1984) (per curiam) (court exercises its discretion to order double costs and attorney's fees in frivolous taxpayer suit). However, we choose not to rely upon Rule 38 because the costs incurred by the Government as a consequence of Carley's vexatious and unprofessional conduct may include proceedings in the district court as well as in this court.

Rather we rely on Rule 11 of the Federal Rules of Civil Procedure. This was amended in 1983 to empower courts to sanction attorneys who use court proceedings to harass, cause unnecessary delay, or needlessly increase the cost of litigation. The amended rule for the first time made explicit the power of courts to impose sanctions on their own motion. It made clear that the signature of an attorney constitutes a certificate that "to the best of his knowledge, information, and belief formed after reasonable inquiry [the pleading] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The rule for the first time detailed sanctions that include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." The Advisory Committee note makes clear the intent of the amendment: "The new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." A similar provision is 28 U.S.C. § 1927, which was amended in 1980 to specifically allow attorney's fees as sanctions. It now states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess

costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

See Mone v. Commissioner, 774 F.2d 570, 574-75 (2d Cir. 1985) (applying sanctions under § 1927).

Carley knew by March 5, 1984, the day on which we affirmed the prior appeal in this case by summary order, that his defenses were baseless. We believe that the Government is entitled under Rule 11 to the costs, including attorney's fees, it has incurred since that date (including this appeal) because of Carley's refusal to provide the documents that are the subject of this action. We therefore remand under Rule 11 for a determination of those costs and fees.

The order is affirmed, appellant to pay double costs on the appeal. Remanded to the district court for a determination of reasonable costs and attorney's fees.